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(3)

IN THE

Supreme Court of the United States

October Term, 1994

CITIZENS BANK OF MARYLAND,

Petitioner,

v.

DAVID STRUMPF,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent's Brief in Opposition

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QUESTIONS PRESENTED

1. Does a Bank violate the bankruptcy automatic stay provisions of 11 USC §362(a) by seizing and denying Debtor access to his checking account funds while the Bank seeks relief from the stay?

2. After a finding that the Bank had knowledge of the bankruptcy and willfully violated the automatic stay, is the awarding of nominal damages, punitive damages and attorney's fees appropriate?

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

Jurisdiction of this Court is based on 28 USC §1254(1).

STATUTORY PROVISIONS INVOLVED

In addition to the five sections of the United States Bankruptcy Code (hereinafter "Bankruptcy Code"), 11 USC §101 et seq., stated by Citizens to be principally involved in this case; 11 USC §362(a)(3) (the text of which is set forth in Appendix E to the Petition for Writ of Certiorari) and 11 USC §362(f) (the text of which is set forth as Appendix A to this Opposition) are also significant to this case.

The five sections cited by Citizens Bank are: §362(a)(7), §363(a), §506(a), §542(b) and §553.

STATEMENT OF THE CASE

On January 25, 1991, David Strumpf (hereinafter "Debtor") filed a voluntary bankruptcy petition seeking relief under Chapter 13 of the Bankruptcy Code. At the time the petition was filed, Debtor had an unsecured personal loan with

Citizens Bank and also maintained a checking account with the same bank. Prior to Debtor's petition, Citizens had not accelerated the note nor setoff any amounts owed against Debtor's checking account.

On February 25, 1991, Citizens Bank and Debtor's other creditors were notified of the bankruptcy filing by the United States Bankruptcy Court for the District of Maryland. The notice further advised Citizens Bank and Debtor's other creditors of the bankruptcy automatic stay and that certain actions were stayed by the bankruptcy filing including "(3) any act to obtain possession of property... (7) the setoff of any debt owing to the Debtor that arose before the commencement of the case..." 11 USC §362(a).

Debtor's Chapter 13 Repayment Plan, 11 USC §1322, was confirmed, 11 USC §1325 by the United States Bankruptcy Court on March 20, 1991, without objection from Citizens Bank, 11 USC §1324, and on the recommendation of the U.S. Trustee, 11 USC §1302. The effect of confirmation is to: "bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted or has rejected the plan." 11 USC §1327(a).

On October 2, 1991, more than six months after confirmation of Debtor's Repayment Plan, and eight months after the bankruptcy petition was filed, counsel for Debtor received a letter from counsel for Citizens Bank acknowledging the bankruptcy, but stating that a hold was being placed on Debtor's checking

account while Citizens Bank sought relief from the bankruptcy stay. Citizens Bank in the Motion for Relief from Stay argued that they had a right to setoff based on Maryland common law.

The "administrative" hold put on Debtor's checking account denied Debtor access to his funds. Made it extremely difficult for Debtor to make his payments under his Chapter 13 Repayment Plan and had the effect of denying payment to all Debtor's other creditors.

Although Citizens Bank denied Debtor access to $3,500.00 of the funds in his checking account, Citizens Bank's claim was for only $3,250.48 of which $317.40 was accumulated interest from the time Debtor filed his bankruptcy petition and $382.58 was for counsel fees for filing the Motion for Relief from Automatic Stay.

The United States Bankruptcy Court granted Citizens Bank's Motion for Relief from Automatic Stay and for Setoff on December 2, 1991. However, before that ruling, on November 13, 1991, the United States Bankruptcy Court, on Debtor's motion, held Citizens Bank in contempt for violations of the automatic stay, 11 USC §362(a) when it placed a hold on Debtor's checking account. The United States Bankruptcy Judge ordered Citizens Bank to pay nominal damages of $25.00, punitive damages of $375.00 and counsel fees of $500.00. The amount of Debtor's counsel fees were stipulated to by Citizens Bank. Testimony was presented by the Debtor that Citizens Bank in denying him his funds was a great hardship and made it difficult for him to meet his ongoing expenses.

After the Court's ruling holding Citizens Bank in contempt, Citizens Bank released their hold on Debtor's funds and although Debtor was very pleased with the service he received from Citizens Bank, Debtor switched his funds to another bank. This made the granting of relief from the automatic stay meaningless to Citizens Bank.

Citizens Bank appealed the Bankruptcy Court's finding of contempt and assessment of nominal damages, punitive damages and attorney's fees. The U.S. District Court reversed stating: "permitting the Bank to freeze the funds until such time as the Court rules on the Bank's Motion for Relief from Automatic Stay and for Setoff is the only sensible procedural approach under these circumstances." In re Strumpf, 138 BR 792 (D. Md. 1992)

Debtor then appealed to the United States Court of Appeals for the Fourth Circuit, In re: Strumpf, 37 F3d 155 (4th Cir. 1994), which reversed the decision of the District Court and remanded with instructions to reinstate the Bankruptcy Court decision finding Citizens Bank violated the automatic stay (the finding of contempt was surplusage) and the awarding of nominal damages, punitive damages and attorney's fees, 37 F3d at 159.

The Court of Appeals based its ruling on the clear, unambiguous language of the Bankruptcy Code. 37 F3d at 159.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I. There is no division among the Circuit Court of Appeals that have considered the issue.

Citizens Bank cites In re Patterson, 967 F2d 505 (11th Cir., 1992)

as supporting the position that an "administrative" hold on debtor's funds does not violate the bankruptcy stay provision of 11 USC §362(a) and is, therefore, contrary to the Court of Appeals ruling in the instant case. This is not a proper interpretation.

The Patterson court stated:

> "The Credit Union violated general provisions of the automatic stay when in froze the Patterson's accounts and reduced the amount of an outstanding loan by the amount in the account. Such conduct represents a unilateral determination by the Credit Union of its right to setoff, a determination more appropriately within the province of the bankruptcy court." Id at page 514.

Citizens Bank quotes at length (pages 14 and 15 of Petition) from Patterson, but excludes from the quote the Court's statement "We disagree" In re Patterson 967 F2d at 511 (11th Cir.

1992), thus changing the meaning of the quote.

What the Patterson court suggested was an alternative to denying a debtor access to his funds is that the funds be placed into the registry of the bankruptcy court. However, in the instant case and the Patterson case it was not the fact situation before the Court that funds had been placed into the court registry. The ruling on the facts in Patterson are the same as the ruling below on this case.

The other Court of Appeals case cited by Citizens Bank as contrary to the instant case is: In re Davis, 889 F2d 658 (5th Cir. 1989), cert. denied sub nom. Campbell v. United States, 495 US 933 (1990).

The facts in Davis case involved the Internal Revenue Service having its

bankruptcy claim reduced for not turning over a tax refund as so ordered by the Bankruptcy Court. The tax refund was not paid pending an appeal by the IRS that was later withdrawn. The facts of the Davis case are, therefore, significantly different than the one in the instant case.

II. The Courts of Appeals that have considered whether an "administrative" hold violates the Bankruptcy stay provision of 11 USC §362(a) have ruled similar to the instant case

The Third Circuit Court of Appeals has held that banks cannot setoff debts against a corporate account as a matter of law during a bankruptcy reorganization without first obtaining relief from the automatic stay. In re Penn Central Transportation Co. 453 F2d 520 (3rd Circ. 1972).

The Court of Appeals for the Third Circuit stated in United States v. Norton, 717 F2d 767 (3rd Cir. 1983):

> "If a bank could freeze the Debtor's accounts upon the filing of a petition in Bankruptcy, the Debtor's chances for successful rehabilitation would be substantially diminished. (at 773)

The Fourth Circuit Court of Appeals quoted favorably from Norton in United States v. Reynolds, 764 F2d 1004 (4th Cir. 1985). The Fourth Circuit again repeated this quote in the instant case in supporting its finding. 37 F3rd at 159

III. The Apparent Split of Authority in United States Districts and the Bankruptcy Court.

Several District Courts and Bankruptcy Courts that have ruled on this

issue have reached differing conclusions.[1]

It is significant that many decisions that held it did not violate the bankruptcy automatic stay for banks to deny debtors their funds, including In re Edgins, 36 BR 480 (Bankr. 9th Cir. 1984) were decided prior to the 1984 Amendments to the Bankruptcy Code effective on July 10, 1984, in which Congress significantly strengthened 11 USC §362(a) by adding to the acts that were stayed by the filing of a bankruptcy petition "... to exercise control over the property of the estate." 11 USC §362(a)(3).

[1]An opinion which finds freezing a debtor's bank account is a violation of the bankruptcy automatic stay and gives a very good analysis of the Bankruptcy Code in In Re Patterson, 125 BR 40 (N.D. Ala. 1990) affirmed 967 F2d 1992. A contrary view is In re Edgins, 36 BR 480 (Bankr. 9th Cir. 1984) a 2 to 1 bankruptcy panel decision.

Also as previously discussed, this issue has been settled in the Third, Fourth, Eighth and Eleventh Circuit Courts of Appeal and, therefore, contrary decisions in these Circuits would be without validity.

IV. The Automatic Stay is the Cornerstone of the Bankruptcy Code.

Upon the filing of a bankruptcy petition, one of the fundamental principles of the Bankruptcy Code goes into effect. That is the automatic stay provisions of 11 USC §362(a). The automatic stay gives order to the proceedings by preserving Debtors assets and assuring that all creditors are treated alike.

Citizens Bank is arguing that they should be allowed to deny a debtor access to his checking account funds and put themselves ahead of all other of Debtor's

creditors, including debts classified as priority, secured and unsecured non-priority, 11 USC §507. Citizens Bank was only in a position to do this because Debtor was very pleased with the service he received at Citizens Bank and, therefore, chose to continue banking at Citizens Bank after his petition was filed. Debtor could have avoided Citizens Bank seizing his funds by merely withdrawing his money before his petition was filed.

Citizens Bank had several alternatives to violating the bankruptcy automatic stay. Among these would have been for Citizens Bank to object to Debtor's Repayment Plan and their treatment therein. Citizens Bank could also have waited until debtor was discharged and Debtor's bankruptcy case was closed, the bankruptcy stay

terminated, and then taken steps at that time to enforce any lien they may have had. Liens are not discharged in bankruptcy, 11 USC §362(c).

Citizens Bank could also have requested an ex parte motion. This is provided for in 11 USC §362(f) and was suggested as an alternative by the Fourth Circuit in the instant case, 37 F3d at 156.

V. The Clear Language of the Bankruptcy Code Does Not Support Citizens Bank's Argument.

Citizens Bank argues that Debtor violated 11 USC §363(c)(2) by using Citizen's "cash collateral" (Petition page 28). This section of the code clearly applies to debtors engaged in business. In the instant case, Debtor wad retired and his whole source of

income was retirement benefits and social security.

Citizens next argues that 11 USC §542(b) sanctions their actions, but again a reading of the code shows that this section is not an exception to the bankruptcy automatic stay provisions of 11 USC §362. To quote §542(b) "Except as provided in subsection (c)..." and subsection (c) states "Except as provided in section §362(a)(7)." §542(b) goes on to state "that such debt may offset under §553 of this title." The language of §553 (another section relied on by Citizens Bank) states, "Except as otherwise provided in this section and in sections 362..."

11 USC §506(a) also relied on by Citizens Bank also incorporate 11 USC §553.

Therefore, Citizens Bank's argument that "This case presents the Court with an opportunity to return the law governing setoffs in bankruptcy cases to the carefully balanced statutory framework established by Congress in the Bankruptcy Code," is not supported by the clear language of the Bankruptcy Code.

VI. <u>Conclusions</u>.

Debtor prays that the Court deny the Petition for Writ of Certiorari because:

1. There is no split of authority among the United States Courts of Appeals that have considered this issue, and

2. There is not the apparent split of decisions in the United States District Courts and Bankruptcy Courts in light of the 1984 Amendments that strengthen the Bankruptcy Automatic Stay, 11 USC §362(a). Also, this issue has

been settled in the Third, Fourth, Eighth and Eleventh Circuit Courts of Appeal, making opinions to the contrary invalid, and

3. The literal language of the statute does not support Citizens Bank's argument that it does not violate the bankruptcy automatic stay provision of the Bankruptcy Code to seize and deny a debtor access to his checking account funds.

Respectfully submitted,

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APPENDIX A

11 USC 362(f)

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.